IN FACT AND IN LAW

Life and Disability Insurance

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Fraudulent Misrepresentations:
the Court of Appeal Revisits the Test

By Evelyne Verrier

On February 2, 2005, the Court of Appeal rendered judgement in L'Union-vie, compagnie mutuelle d'assurance *v.* Laflamme[1]*, and allowed the appeal of Union-Vie, the defendant in the case. In the court of first instance, Union-Vie had been ordered to pay insurance proceeds of $200,000 further to the death, on September 27, 2001, of the Plaintiff's spouse, pursuant to a life insurance policy issued on the basis of an insurance application dated October 23, 1998. The case is currently the subject of an application for leave to appeal to the Supreme Court of Canada.*[2]

The Facts

On October 23, 1998, Union-Vie, a mutual insurance company, issued a life insurance policy on the basis of an application completed the same day by the insured, the late Alain Rousseau, through Normand Labrie, an insurance broker.

The insurance application included a specific question pertaining to drug use, which read as follows:

TRANSLATION:

"HAS ANY PERSON COVERED BY THIS INSURANCE APPLICATION:

12. used heroin, morphine, cocaine, barbiturates, amphetamines, LSD, marijuana or other analogous drugs or narcotics, other than as prescribed by a physician?"

Rousseau answered this question in the negative, whereas the evidence clearly proved that Rousseau had been a drug user since adolescence. Moreover, four months before he signed the insurance application, Rousseau had been told to stop working by his attending physician and had been referred on an urgent basis to a psychiatrist. On June 8, 1998, Dr. Paul Rivard, psychiatrist, met with Rousseau and his diagnostic impression was as follows:

"Diagnostic Impression

Axis 1: Cocaine abuse, no major depression, elements of circumstantial anxiety.

Axis 2: Delayed.

Axis 3: SP

Axis 4: Work and familial stressors, including the birth of a child.

Axis 5: Usually satisfactory level of intellectual functioning has declined in recent months."

On September 27, 2001, Rousseau committed suicide and Union-Vie refused to pay out the insurance proceeds to Ms. Laflamme. Union-Vie maintained that it would not have issued the policy to Rousseau on October 23, 1998 had it known that he used cocaine at least until May 1998. Under the circumstances, Union-Vie cancelled the insurance policy *ab initio* and offered to refund the insurance premiums that had been paid.

LAVERY, DE BILLY

BARRISTERS AND SOLICITORS

[1] *L'Union-vie, compagnie mutuelle d'assurance* v. *Julie Laflamme*, C.A.Q. 200-09-004726-045, February 2, 2005, 2005 QCCA394, Justices Beauregard, Morin and Rayle.

[2] *Julie Laflamme* v. *L'Union-vie, compagnie mutuelle d'assurance*, S.C.C., 30854.

The Issues

Because both the trial judge and the Court of Appeal found, first, that Rousseau misrepresented his drug use in answering the question concerning drug use, and secondly, that he would not have been insurable in October 1998 had Union-Vie known that information, the only issue which remained to be decided was whether the misrepresentation constituted fraud within the meaning of Article 2424 C.C.Q.?

Article 2424 C.C.Q. provides as follows:

> **"In the absence of fraud, misrepresentation or concealment as to risk does not justify the annulment or reduction of insurance which has been in force for two years.**
>
> **This rule does not apply in the case of disability insurance if the disability begins during the first two years of the insurance."**

The Judgement of the Superior Court

The Superior Court first considered the circumstances in which misrepresentation can be characterized as insurance fraud. In this context, the Court adopted the conclusion of Justice Baudouin, in *Giguère* v. *Mutuelle-vie des fonctionnaires du Québec*[3]:

> **[Translation] "For a finding of fraud, misrepresentation does not suffice: the intention to mislead is an essential supplementary element of the act. Even if the insurance contract is *uberrimae fidei*, it must be proved that there was deliberate intent to mislead the insurer into signing a contract that it would otherwise not have entered into, or would have done so but on different terms and conditions. The intentional pursuit of an advantage impossible to obtain otherwise is therefore crucial. The case law on this point is unanimous and could not be clearer. (...)"**

Having established this as Union-Vie's burden of proof, the trial judge concluded from the evidence that there had been "no premeditation" by Rousseau to obtain life insurance. In fact, it was at the broker's insistence that Rousseau was persuaded to take out the life insurance policy. The Court also accepted that Rousseau had answered most of the questions properly and that had he confessed to his wife that he used drugs, they would have broken up. The trial judge was also of the view that Rousseau had exhibited certain problems concentrating when he was completing the insurance application, which could have given rise to verifications which Union-Vie could have carried out based on the medical and hospital records to which it had access pursuant to authorizations given by Rousseau.

Lastly, the trial judge noted that the application referred to an automatic cancellation of the contract where there is misrepresentation regarding tobacco use, whereas there was no such warning regarding drug use.

The trial judge concluded as follows:

> **[Translation] "[47] Union-Vie has a heavy burden to discharge to prove that the misrepresentation constitutes fraud. It would have been necessary to prove that the misrepresentation was made for the purpose of obtaining the life insurance policy. Mr. Rousseau needed to have deliberately intended to mislead the insurer for that purpose. However, that has not been proven."**

Thus, even if there had been misrepresentation regarding drug use and non-insurability as a result, this situation did not constitute fraud within the meaning of Article 2424 C.C.Q. and could not result in nullity of the life insurance policy that had been in force for more that two years at the time of death, unless a deliberate intent to mislead the insurer was established.

[3] *Giguère* v. *Mutuelle-vie des fonctionnaires du Québec*, [1995] R.J.Q. 1990, 1993.

The Judgement of the Court of Appeal

In a unanimous decision, the Court of Appeal reversed the Superior Court's judgement and dismissed Plaintiff's action.

The Court of Appeal agreed with all of the trial judge's findings of fact but did not share his legal conclusion based on those facts. The Court was of the view that fraud had been proved. It concluded as follows:

> **[Translation] "[9] As the applicant was of sound mind and was presumed to know the consequences of his statements, there is *prima facie* evidence that he answered the question in the negative so that the insurer would not know that he had used cocaine;**
>
> **[10] Even considered together, the various elements of the circumstantial evidence do not destroy the *prima facie* evidence;"**

The Court of Appeal therefore held that the following findings of fact were insufficient to persuade it that the insured had acted in good faith:

- the fact that the broker was insistent that Rousseau take out life insurance, even though, in the past, Rousseau had never expressed any interest in such insurance;
- the fact that Rousseau's negative answer to a question which he knew was important may or may not have been premeditated;
- Rousseau's motive for falsely answering in the negative;
- the fact that Union-Vie specifically stated in the insurance application that misrepresentation regarding tobacco use would automatically lead to cancellation of the contract but remained silent on use of narcotics;
- the fact that Rousseau knew that Union-Vie could have access to medical information that would have exposed his misrepresentation.

Conclusion

This decision is consistent with the well-established principles of the Court of Appeal in fraud cases: an insurer must prove an intention to mislead for the purpose of inducing the signing of a contract that it would have been impossible to obtain otherwise.

However, the Court of Appeal has reduced the burden on the insurer to prove that the misrepresentation constitutes fraud, a burden generally considered as heavy by the Courts. Once it was established that the applicant was of sound mind and that he was presumed to know the consequences of his statements, there was *prima facie* evidence that his misrepresentation of a fact pertinent to insurability was intended to hide information from the insurer. In these circumstances, the applicant, or the beneficiary of the insurance, will then have the burden of proving that such an inference is unfounded. However, the burden of proof has not shifted. The insurer must still convince the court of fraud on the balance of probabilities and if it is probable that the insured was in good faith, then the insurer will not be successful.

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